

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DIANE DOOLEY</b>	:	DETERMINATION
	:	DTA NO. 818206
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1994.	:	

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Petitioner, Diane Dooley, 3 Costa Lane, Redding, Connecticut 06896, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1994.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the grounds that the Division of Tax Appeals lacks jurisdiction to consider the merits of this proceeding by reason of the failure of the petitioner to file a petition within 90 days of the date of mailing of the Conciliation Order. The Division of Taxation submitted a Notice of Motion dated May 9, 2001 and the affidavit of Jennifer A. Murphy, Esq., with attachments, in support of its motion. Petitioner did not respond to the motion as permitted by June 8, 2001, but instead faxed a letter that date to the Assistant Chief Administrative Law Judge requesting an extension of time to file her answering papers. Petitioner was granted an extension until June 22, 2001, which date began the 90-day period for issuance of this determination. No answering papers have been received from petitioner.

Upon review of the pleadings, and the affidavit and attached documents submitted in support of the motion of the Division of Taxation, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner timely filed her petition with the Division of Tax Appeals following the issuance of the Conciliation Order.

***FINDINGS OF FACT***

1. Petitioner, Diane Dooley, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”). The request was in response to a determination by the Division of Taxation (“Division”) that petitioner had income subject to New York State personal income tax in tax year 1994.

2. BCMS scheduled a conciliation conference for May 15, 2000 in Rye Brook, New York. Petitioner was represented at the conference by her husband, Jeffrey Dooley. By its Conciliation Order dated September 15, 2000, BCMS denied petitioner’s request and sustained the statutory notice.

3. On December 18, 2000, the Division of Tax Appeals received the petition in this matter. The envelope containing the petition was sent by certified mail and was postmarked December 15, 2000. Petitioner’s signature on the petition was dated December 14, 2000.

4. On January 5, 2001, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, a copy of which is attached to the affidavit of Jennifer A. Murphy, Esq. The notice stated:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on September 15, 2000 but the petition was not filed until December 15, 2000 or ninety-one days later.

Pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the Parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

5. The attachments to the affidavit of Ms. Murphy include affidavits from two other Division employees, Carl Decesare and James Baisley, explaining the Division's mailing procedures with respect to conciliation orders. Also included are copies of the certified mail records for the conciliation orders mailed on September 15, 2000, a copy of the conciliation order which denied petitioner's request and sustained the statutory notice, a copy of the statutory notice and a copy of the request for conciliation conference.

6. The affidavit of Carl Decesare, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. The Data Management Services Unit prepares the conciliation orders and the certified mail record ("CMR") which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The CMR attached to Ms. Murphy's affidavit consists of six pages. Petitioner's name and address appear on page 5. A unique certified control number is assigned by an internal computer application to each conciliation order. This number is printed on the CMR next to the name of the taxpayer to whom the order is being mailed. A BCMS clerk verifies the names and addresses of taxpayers who are listed on the CMR. Certified control number P811142735 was

used for the conciliation order mailed to petitioner. The conciliation orders and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

7. Each page of the CMR is a separate and individual certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to affix his or her signature.

8. All of the names and addresses listed on the CMR have been redacted except the entry for petitioner. This is done to preserve the confidentiality of information relating to other taxpayers. On page 5 of the CMR there are 7 entries and 7 certified control numbers. There were no deletions.

9. The CMR is date stamped September 15, 2000 by the Colonie Center branch of the United States Postal Service ("USPS"). At the bottom of the CMR the number "7" has been entered in the blank space next to "Total Number of Pieces Listed by Sender" but only the postal employee's initial appears in the blank space following "Total Number of Pieces Received at Post Office." There is no entry in the last space at the bottom of the CMR next to "(Name of receiving employee)."

10. The Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record.

11. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center, sets forth the procedures followed by the Mail Processing Center in delivering outgoing certified mail to branches of the USPS. After a notice is placed in the "outgoing

certified mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR.

12. On September 15, 2000, a member of the staff of the Mail Processing Center delivered the sealed, stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. The postal employee affixed a postmark to the CMR to indicate receipt by the USPS. The Division’s Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

13. As a matter of standard procedure of the Mail Processing Center and to insure accountability, the CMR may be left overnight at the Post Office to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. The CMR is picked up at the post office the following day and is delivered to BCMS by a member of the Mail Processing Center staff. The regular procedures of the Mail Processing Center, concerning the mailing of certified mail, were followed in the mailing of the piece of certified mail described herein to petitioner on September 15, 2000.

14. The final attachments to the affidavit of Jennifer A. Murphy, Esq., consist of the affidavit of Mary Sauter, sworn to May 8, 2001, and both sides of a USPS Form 3811-A, Domestic Return Receipt (After Mailing). Ms. Sauter is a Legal Assistant I in the Office of Counsel of the New York State Department of Taxation and Finance, and her duties include the preparation of United States Postal Forms 3811-A for mailing. The purpose of the Form 3811-A is for use by the mailer to request a return receipt after mailing for registered, certified, insured or

express mail. Ms. Sauter completed certain parts of the form based on information contained in the CMR including items 3 (petitioner's name and address); 4 (certified number P811142735); and 5 (date of mailing - 9/15/00). She placed an "x" in the box at item 1 to indicate that a return receipt was not paid for at the time of mailing, and in box 6 next to the word "certified" to indicate the nature of the mailing on September 15, 2000. The reverse side of the form bears Ms. Sauter's name and address at the Office of Counsel.

15. Ms. Sauter mailed the Form 3811-A and received it back from the post office with the delivery post office's stamp in item 7; the name of the recipient, "Diane Dooley," in item 8; the delivery date, "9/18/00," in item 9; an "x" in the box in item 11 to indicate that postal records show delivery was made; and the postal clerk's initials, "PT" in item 12.

### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law

judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 681(b) the conciliation order in this case and the underlying notice of deficiency would be binding on petitioner unless she filed a timely petition with the Division of Tax Appeals.

C. Where, as here, the timeliness of a taxpayer’s protest against a statutory notice or conciliation order is in question, the initial inquiry focuses on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). Because page 5 of the CMR contains no entry by the USPS to indicate the actual number of pieces of mail received at the post office, the CMR fails to establish that the item addressed to petitioner was actually mailed to her on September 15, 2000 (*see, Matter of Cal-Al Burrito*, Tax Appeals Tribunal, July 30, 1998). More evidence is required

in order to prove that the Conciliation Order was mailed.

D. The Division of Taxation submitted direct evidence of the actual receipt of the Conciliation Order in the form of the USPS Form 3811-A, the Domestic Return Receipt (After Mailing). This document certifies that USPS records show the receipt by petitioner of the Conciliation Order on September 18, 2000. September 15, 2000, the Division's claimed date of mailing, fell on a Friday. The September 18 date of receipt was a Monday. Having established petitioner's receipt of the Conciliation Order on Monday, September 18, serves to corroborate the Division's claim that it mailed the Order the previous Friday by ruling out any reasonable possibility that the Order was mailed later than Friday, September 15, 2000.

E. Inasmuch as there are no material and triable issues of fact, the Division of Taxation's motion for summary determination is granted.

F. The petition is denied and the Notice of Deficiency is sustained.

G. The Notice of Intent to Dismiss of the Division of Tax Appeals is sustained.<sup>1</sup>

DATED: Troy, New York  
August 2, 2001

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup>It should be noted that petitioner is not entirely without redress because she can still obtain a hearing on the merits of her case by paying the assessment, filing a claim for refund within two years from the time of payment (Tax Law § 687[a]) and, if the claim is denied, filing a petition contesting such denial of refund within two years of the denial in accordance with Tax Law § 689(c).